

1. 1513646 (Migration) [2015] AATA 3655 (12 November 2015)
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- 3.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Ahmed Tahmid Saiman
Mrs Halima Akter

CASE NUMBER: 1513646

DIBP REFERENCE(S): BCC2012/1026201

MEMBER: Glen Cranwell

DATE: 12 November 2015

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 886 (Skilled - Sponsored) visas:

- Public Interest Criterion 4020 for the purposes of cl.886.225 of Schedule 2 to the Regulations.

Statement made on 12 November 2015 at 2:07pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 April 2014 to refuse to grant the applicants Skilled (Residence) (Class VB) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 20 September 2012. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.886.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the applicant's skill assessment, given to the Department, is a bogus document and he did not satisfy PIC 4020.
6. The applicants were represented in relation to the review by their registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.886.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
9. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

10. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
11. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The delegate's decision record indicates that on 21 September 2012 the applicant gave to the Department a skills assessment from TRA, reference number TRA09/004252267. The Tribunal notes that the skills assessment, dated 16 September 2009, is attached to the Department's file. The delegate noted that the skills assessment had been obtained on the basis of documents supporting the applicant's claim to have work experience from Punjabi Palace Restaurant. The delegate noted however that on 5 February 2012 TRA advised the Department that it doubted the veracity of the documents used to obtain the skills assessment, and TRA provided records of an interview by investigating officers with the owner of Punjabi Palace Restaurant. The delegate noted that the owner had said during the interview that the applicant was not employed at the Punjabi Palace Restaurant, and provided a sworn statement to that effect.
14. The Department's file does not contain the advice from TRA, nor the record of interview which was provided to it by TRA. The Tribunal notes that s.352(4) of the Act requires the Department to provide the Tribunal with all documents in its possession relevant to the review. The application for review was lodged with the Tribunal on 14 May 2014, which is approximately 18 months prior to the date of this decision. The Tribunal considers that to be ample time for the Department to have provided this evidence.
15. In the absence of the TRA advice or record of interview, the Tribunal is unable to be satisfied that the applicant has provided a bogus document. The Tribunal engages in evidence based decision making, and it should not be forced to rely upon the delegate's account of the evidence rather than the evidence itself, particularly where there is a statutory obligation to provide the evidence in question.
16. For completeness, the Tribunal notes that it is not clear whether the sworn statement by the Punjabi Palace Restaurant was provided by TRA to the Department. In any event, the statement is not before the Tribunal. Given the failure by the Department to provide the other evidence supporting its decision, the Tribunal is disinclined to take further steps to obtain the sworn statement.
17. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

18. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
19. There is no evidence that the visa applicant or any member of the family unit have been refused a visa in the relevant period because of a failure to satisfy cl.4020(1). Therefore cl.4020(2) is met.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

20. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The visa applicant provided the Department with a copy of the identification page of his Bangladeshi passport. Therefore, the visa applicant meets cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

21. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
22. There is no evidence that the visa applicant or any member of the family unit have been refused a visa in the relevant period because of a failure to satisfy cl.4020(2A). Therefore cl.4020(2B) is met.
23. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.886.225.

DECISION

24. The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 886 (Skilled - Sponsored) visas:
 - Public Interest Criterion 4020 for the purposes of cl.886.225 of Schedule 2 to the Regulations.

Glen Cranwell
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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